

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

THE ATHERTON MILLS, APPELLANT,	}	No. 16.
v.		
EUGENE T. JOHNSTON AND JOHN W.		
Johnston, by Eugene T. Johnston, his prochein ami.		

*APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF NORTH
CAROLINA.*

SUPPLEMENTAL BRIEF FOR THE UNITED STATES AS AMICUS CURIAE.

In this case the District Court declared unconstitutional the excise tax imposed by Congress upon those employing child labor in mines, quarries, factories, etc.

THE STATUTE.

The tax was imposed by section 1200 of the revenue act of 1918, approved February 24, 1919, 40 Stat., c. 18, p. 1138, which provides as follows:

That every person (other than a bona fide boys' or girls' canning club recognized by the Agricultural Department of a State and of the United States) operating (a) any mine or quarry situated in the United States in

which children under the age of sixteen years have been employed or permitted to work during any portion of the taxable year; or (b) any mill, cannery, workshop, factory, or manufacturing establishment situated in the United States in which children under the age of fourteen years have been employed or permitted to work, or children between the ages of fourteen and sixteen have been employed or permitted to work more than eight hours in any day or more than six days in any week, or after the hour of seven o'clock postmeridian, or before the hour of six o'clock antemeridian, during any portion of the taxable year, shall pay for each taxable year, in addition to all other taxes imposed by law, an excise tax equivalent to 10 per centum of the entire net profits received or accrued for such year from the sale or disposition of the product of such mine, quarry, mill, cannery, workshop, factory, or manufacturing establishment.

Succeeding sections provide the basis upon which net profits are to be calculated and contain provisions the effect of which is that the mere accidental employment of children under the permitted age shall not make the employer liable for the tax if he has in good faith taken the required precautions to prevent such employment.

THE FACTS.

On April 15, 1919, John W. Johnston, a minor, and his father filed a bill against the Atherton Mills. It alleged that the minor was employed in a cotton mill

operated by the defendant; that he was over fourteen, but under sixteen, years of age; that the defendant company had notified him that he would be discharged upon the going into effect of the act of Congress above quoted; that his discharge would be due alone to the attempt of Congress to impose the tax mentioned; and that the act in question was unconstitutional; and it prayed for an injunction restraining the company from discharging the minor.

The defendant's answer admitted the facts alleged, but denied that the act was unconstitutional. The District Attorney was notified, and intervened as *amicus curiae*. He suggested that the court was without jurisdiction, especially in view of the fact that the bill did not allege a contract of employment which limited the right of the employer to discharge the plaintiff for any reason whatever. On May 2, 1919, however, the District Court decided that it had jurisdiction and that the act was unconstitutional, and granted the injunction. The defendant appealed to this court, but, beyond notifying the Attorney General of the appeal, has taken no further part in the proceeding.

The case was argued on December 10, 1919. On June 6, 1921, the court directed a reargument and called the attention of counsel to the question of jurisdiction. The Government had not dwelt upon that phase of the case because it desired to secure a decision upon the constitutionality of the statute.

ARGUMENT.

I.

The minor is now over sixteen years of age. If he had any right to employment until he was sixteen, it was fully protected by the lower court. No decision by this court could now affect any rights of either of the parties in the pending case.

The statute provides that every person operating such a factory as that operated by the appellant in which children between the ages of fourteen and sixteen years have been permitted to work more than a designated number of hours per day or per week during any portion of the taxable year shall pay an excise tax on the entire net profits received or accrued during such year from the products of such factory.

The bill, which was sworn to on April 14, 1919, avers that the minor in question "is over the age of fourteen but under the age of sixteen years." It avers that the Atherton Mills, solely because of the act of Congress now under consideration, was about to discharge the said minor from its employment altogether, and that if it should fail to carry out its threat it would at least curtail his hours of employment. It thereupon prays that the act of Congress be declared invalid and that the Atherton Mills be enjoined from discharging the minor or curtailing his hours of employment. The injunction was granted and is still in force.

As the minor was over the age of fourteen on April 14, 1919, *he must now be over the age of sixteen years.*

The act of Congress, therefore, does not now apply to him. Until he reached the age of sixteen he had the benefit of the injunction which was granted by the court below; and it is no longer a matter of concern to him whether the statute be valid or invalid.

II.

The case does not present a real controversy between the parties. It is simply a friendly suit between an employee and his employer, in which the employee is asking the court to declare a statute invalid, although, whether it be valid or invalid, the employer is in either case still free to take the step which the employee is asking the court to prevent the employer from taking.

Even at the time the bill was filed the law interposed no obstacle to the boy's employment. The most that can be said is that until he reached the age of sixteen his employer could not give him work in excess of eight hours per day without subjecting himself to the excise tax.

The case, as developed on bill and answer, simply presents a situation where a defendant having full liberty to discharge the minor in question, or full liberty to employ him if he so elects, threatens, as he had a full right to do, to discharge the employee. Under these circumstances the Atherton Mills, if it saw fit to employ the minor in question for more than eight hours a day, could contest the validity of the tax when it was imposed. But it does not follow that an employee, who has no right to continuing employment, can enjoin the employer from taking a

step which the employer is free to do whether the statute be valid or invalid. If this were so, the invalidity of statutes, instead of being decided in a direct proceeding, where a plaintiff had a direct and necessary legal interest in the question involved, could be raised collaterally by the mere averment, which could take various forms, that if a statute had not been passed some individual, with whom the plaintiff had some kind of relation, might have acted differently than he otherwise would.

This method of challenging a statute is not to be commended. It is quite obvious that the suit is a friendly one. Both plaintiff and defendant desire the same result. While their good faith is not questioned, yet the United States is thus brought into a litigation in which it has technically no status and in which its counsel must appear as *amicus curiae*. In purpose and effect this is a suit against the United States to challenge one of its laws, and yet the United States is not a party to the record. Such a procedure is questionable. If the statute in question is to be assailed in the courts, it should be assailed in a more direct manner.

III.

Truax v. Raich does not justify the procedure followed in this case.

The plaintiffs may rely upon the decision in *Truax v. Raich*, 239 U. S. 33, as justifying this mode of procedure; but that decision does not meet the present case.

In *Truax v. Raich* a State had passed a law subjecting an employer to imprisonment unless eighty per cent of his employees were either qualified electors or native-born citizens of the United States. An employee, who was an Austrian, was informed by his employer that by reason of the law and "the fear of the penalties" he would be discharged. The employee then filed a bill against his employer, the Attorney General of the State, and the County Attorney, and "upon the allegation that these officers would prosecute the employer unless he" discharged the alien, asked that the law be declared unconstitutional.

This Court sustained the right of the plaintiff to proceed in that manner. It held that public officials who were about to enforce an unconstitutional statute might be enjoined; and it ruled that the plaintiff's right to his remedy was not affected by the fact that he was employed at will, holding that "the unjustified interference of third persons is actionable although the employment is at will." The Court held that the statute was unconstitutional.

It must be admitted that that case is closely analogous to the *Atherton Mills Case*. There are, however, two important differences.

(a) The Arizona statute directly prohibited the employment in question. It made it a criminal offense. The Act of Congress, however, does not prohibit the employment of this boy, nor limit his working hours. It simply imposes an excise tax upon the manufacturer who does employ minors under the circumstances stated in the Act. The employer is

free to employ the boy, pay the tax, and, if he has doubts as to its validity, assail it by a direct proceeding.

(b) In *Truax v. Raich* the remedy sought was an injunction to prevent the prosecuting officials from enforcing the penal provisions of an unconstitutional statute. There was no room for conjecture or liberty of action. If the alien were employed, it was the sworn duty of the Attorney General and his deputy to indict the employer. The State whose law was challenged was made a party to the proceedings and had a full status as a party litigant.

In the Atherton Mills Case the United States is not made a party and, but for the fairness and courtesy of the parties litigant, it might never have heard of the case until it was decided. The fact that the plaintiffs below promptly notified the proper officials of the pendency of the suit and invited their participation can not alter the fact that they did not proceed against the officers of the Government who were obliged to carry out a presumably valid statute.

It is submitted that the decision in *Truax v. Raich* does not require this Court to go further and permit the validity of a statute to be tested in private litigation in a case in which the injury to the plaintiff is both remote and conjectural and in which the defendant is not subjected to any criminal action, but may test the statute in the manner in which all taxing statutes may be tested.

IV.

CONCLUSION.

For the reasons above set forth, the Government believes that the court should dismiss this case for want of jurisdiction.

If, however, the court should decide that it has jurisdiction, the Government then rests its argument on the merits of the question, viz, the constitutionality of the law, upon its argument in the case of the Drexel Furniture Company (*J. W. Bailey, and J. W. Bailey, Collector of Internal Revenue for the District of North Carolina, Plaintiff in Error, v. Drexel Furniture Company*, No. 657 of this term).

JAMES M. BECK,

Solicitor General.

ROBERT P. REEDER,

Special Assistant to the Attorney General.

FEBRUARY, 1922.

